

breached health and safety obligations resulting in her wrist injury. She seeks compensation for hurt and humiliation suffered as a consequence to her dismissal.

[3] Perrys says it had good reason to dismiss Mrs Rodgers by way of letter dated 15 August 2007 and that her dismissal was handled fairly.

[4] This determination will deal with each of Mrs Rodgers specific concerns in turn and then consider the overarching issue of whether her dismissal was unjustified.

Mrs Rodgers specific concerns

(i) Light duties

[5] The Monday following her injury, Mrs Rodgers attempted to resume her duties. She had a medical certificate which stated she was fit for light duties. She said she was able to perform some duties but her movements were restricted and she could not move cars. Mrs Rodgers was off work for the remainder of the week.

[6] The next Monday Mrs Rodgers was issued with a medical certificate putting her off work for a month.

[7] Three weeks later Mrs Rodgers was issued with a fresh medical certificate providing for a further three weeks of light duties. Perry's had no light duties to offer Mrs Rodgers. Mrs Rodgers received earnings related compensation during the period of the medical certificate.

[8] In early June ACC commissioned a workplace assessment of Mrs Rodgers' role. In her report the assessor records Perrys' advice that it did not have alternative work for Mrs Rodgers, it could not accommodate her restricted working capacity and Mrs Rodgers would have to be fully fit to return to work. The assessor concluded Mrs Rodgers' injury prevented her performing her role and, due to this, a return to work programme could not be established. Subsequent medical certificates say Mrs Rodgers was not fit for any duties.

[9] Perrys had no contractual or statutory obligation to provide Mrs Rodgers with light duties. Perrys was obliged to fairly consider whether it could offer Mrs Rodgers light duties. This is a consequence of its obligation to treat Mrs Rodgers fairly and reasonably,

[10] I am satisfied that Perrys fairly considered whether light duties were available for Mrs Rodgers to perform. A return to work was attempted and proved unsuccessful. The workplace assessment was conducted by an independent assessor and concluded a return to work programme could not be established given Mrs Rodgers restricted work capacity – she could not fulfil the duties of a car groomer.

(ii) Advice of dismissal to ACC

[11] Mrs Rodgers says in mid-June 2007, one month after her accident, her ACC case manager told her Perrys' had terminated her employment and that she would receive a telephone call from Chris Janes (the dealership principal) later that day to advise of her dismissal. Mrs Rodgers did not receive such a call. Mrs Rodgers said she had a very clear recollection of this advice. She considers 15 June 2007 her date of dismissal.

[12] Mr Janes says he had a telephone conversation with the case manager on 15 June 2007 and that he may have said to the case manager that he could not keep Mrs Rodgers role open indefinitely.

[13] I do not accept Mrs Rodgers was dismissed on 15 June 2007. The case manager was not authorised by Perrys to dismiss Mrs Rodgers. Mrs Rodgers received a letter from Perrys advising of her dismissal, having received written advice a month earlier that this would be the outcome of she could not return to work. Mrs Rodgers did not raise this issue with Perrys prior to the filing of the statement of problem. I find Mrs Rodgers dismissal occurred by letter dated 15 August 2007.

(iii) Failure to provide relevant documents

[14] Perrys convened a number of meetings with Mrs Rodgers during her absence to receive updates on her recovery and raise issues about her absence and ongoing

employment. Mrs Rodgers requested copies of the minutes taken by Perrys' during these meetings. These requests were declined. Mr Janes said this was because Mrs Rodgers had her own note-taker at the meeting. Perrys now seeks to rely on these notes as an accurate record of its meetings with Mrs Rodgers.

[15] There was no reasonable basis upon which Perrys could decline Mrs Rodgers request for the notes. At the time Perrys was in an employment relationship with Mrs Rodgers. Parties to employment relationships must deal with each other in good faith¹. The notes were relevant to Perrys' decision making process about Mrs Rodgers future employment and should have been provided to Mrs Rodgers.

[16] Mrs Rodgers confirmed the accuracy of the notes during the course of the investigation meeting. I accept Mr Towner's submission that the failure to provide the notes has not prejudiced Mrs Rodgers.

(iv) Health and safety

[17] Mrs Rodgers makes broad allegations concerning workplace health and safety:

- Perrys' failed to provide a safe workplace and this led to an injury suffered the year before the events at issue;
- Perrys' failed to provide a safe workplace resulting in her wrist injury;
- Inadequate equipment was supplied; and
- Cleaning products contained toxic chemicals.

[18] Mr Janes said Mrs Rodgers was able to order any equipment she required and never raised any concerns about the safety of cleaning products. He said Perrys addressed any health and safety issues Mrs Rodgers draw to its attention. Perrys says Mrs Rodgers' injuries were unfortunate accidents and that Perrys is not to blame.

[19] There is no evidence that Mrs Rodgers raised any concerns about adequacy of equipment or toxicity of cleaning products during her employment. There is no evidence that the accidents Mrs Rodgers sustained at work resulted from failures of Perrys to provide a safe workplace.

¹ Section 4 Employment Relations Act 2000

[20] In the absence of evidence to support these assertions there can be no finding that the obligation to provide a safe and healthy workplace was breached.

Unjustified dismissal

[21] Before her dismissal Perrys wrote to Mrs Rodgers advising that unless she was able to return to work in four weeks fully fit to resume her duties her employment would be terminated. The reasons given were:

- The dealership could not operate satisfactorily with her continued absence; and
- The use of contractors to cover her absence had not worked out – it was costly and delayed, caused stress to grooming and sales staff, and customer expectations as to the cleanliness of cars was not being met.

[22] These issues and the possibility that her employment may not continue had been put to Mrs Rodgers in earlier meetings with Mr Janes.

[23] Applying the test for a justifiable dismissal (section 103A of the Employment Relations Act 2000) and having regard to the principles applicable to dismissals in circumstances where an employee is unable to return to work after a period of time and their return-to-work prognosis is poor² I find that Mrs Rodgers dismissal was justified for the following reasons:

- At date of dismissal Mrs Rodgers had been absent from work for three months;
- There was no information that Mrs Rodgers could return to work;
- Perrys had monitored Mrs Rodgers recovery and treatment programme; and
- Mrs Rodgers was given a fair opportunity to provide any relevant information to the decision maker.

² *Barnett v Northern Regional Trust Board of the Order of St John* [2003] 2 ERNZ 730; *Barry v Wilson Parking New Zealand (1992) Limited* [1998] 1 ERNZ 545

[24] There are procedural defects in this dismissal which do not alter the outcome of the determination but should be set out.

[25] The failure to provide the notes has been dealt with above. Along the same lines, Perrys' accident reporting document should also have been provided to Mrs Rodgers as part of the record of her accident; it contained information about her and assessments of her conduct on which, in fairness, she should have had an opportunity to comment. I accept Mr Janes' evidence that this document did not figure in his decision making as to Mrs Rodgers ongoing employment and is therefore not relevant to the assessment of justification. The employment agreement provided for one weeks notice. The letter of dismissal provided two days notice of dismissal. The usual purpose of notice is to allow an orderly exit from employment. In these circumstances Mrs Rodgers had not been able to perform her role for some months, there was no lost wages because Mrs Rodgers was receiving accident related compensation, no need to take steps to find alternative employment during the notice period and she was aware her employment would end if she could not return to work by 17 August. The breach of agreement does not alter the justifiability of this dismissal.

Costs

[26] Costs are reserved. If Perrys seeks an award of costs against Mrs Rodgers then memorandum should be filed within 21 days of the date of this determination. Mrs Rodgers has a further 14 days to file any reply.

Marija Urlich

Member of the Employment Relations Authority